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June 4, 2007

Delivered by Hand

Marlene H. Dortch, Secretary
Attn: Debbie J. Byrd
Investigations and Hearings Division
Enforcement Bureau, Room 4-C330
Federal Communications Commission
236 Massachusetts Ave., N.W. Suite 110
Washington, D.C. 20002

FILED/ACCEPTED

JUN - 4 2007

Federal Communications Commission
Office of the Secretary

**Re: Response to Letter of Inquiry – Station KCAL-TV, Los Angeles, California
Broadcast of *KCAL 9 News at Noon*, File No. EB-06-IH-1520**

Dear Ms. Byrd:

On behalf of Los Angeles Television Station KCAL, LLC, as licensee of KCAL-TV ("KCAL" or "Licensee"), this responds to the above-referenced May 3, 2007, letter regarding allegations that KCAL transmitted indecent material during its broadcast of the *KCAL 9 News at Noon* on March 27, 2006, at approximately 12:56 p.m. ("Inquiry Letter"). The Inquiry Letter attached a Complaint that, in relevant, part, alleged KCAL broadcast a graphic of several copies of the same magazine cover depicting "a bare womens [sic] butt in see thru [sic] panties," which resulted in "5 to 7 bare butts ... on the screen." For the reasons set forth the below, the Complaint should be dismissed.

Inquiries:

State whether the Licensee broadcast any or all of the material described in the Complaint over the Station on March 27, 2006, at approximately 12:56 p.m. Provide a recording of the broadcast on DVD or a VHS videocassette tape (two copies), including the complained-of material plus the 15 minutes aired before and after it, and a written transcript of the recording.



The March 27, 2006, edition of the *KCAL 9 News at Noon* included a news segment that utilized a visual that appears to be what the Complaint attempted to describe. Two DVD copies of the newscast are included herewith as Attachment A, as is a copy of the script as Attachment B.

The Complaint's description of the newscast does not accurately reflect the material that aired on KCAL. The Complaint asserts that "[a]t around 12:53-12:56 ... a clip pop'd [*sic*] in not related to the story" that "showed mens [*sic*] magazine covers," where the "photo was the entire cover and it was a bare womens [*sic*] butt in see thru [*sic*] panties." It further alleges that "[a]bout 5 to 7 mag [*sic*] covers were displayed, so 5 to 7 bare butts were on the screen." The Complaint then speculates that the inclusion of this visual image was a mistake, because "after the clip came up the news guys went oooops on air, and the clip changed fast to the story."

The Complaint's description of the newscast in question contains numerous significant inaccuracies and distortions. As a threshold matter, the image that the Complainant describes illustrated a news story about FHM magazine's selection of the 100 sexiest women, including the fact that actress Scarlett Johansson topped the 2007 list. Consequently, it was not a "prank" or an "accident" as the Complaint suggested, nor was it "unrelated" to KCAL's coverage of the news, all of which is evident from the enclosed recording of the newscast. The illustration at issue depicts an FHM magazine cover that pictures a woman clothed in a pair of black women's underwear. The undergarment in question covers from the waist to top of the upper thigh, and is not a thong or similarly skimpy cut. *See* Att. A. The image appeared on screen for less than two seconds at the end of the story.

Furthermore, the Complaint's allegation that there were "5 to 7 bare butts on the screen" during the newscast is patently false, as the enclosed recording clearly shows. Although the illustration for the news story included four identical FHM magazine covers, they were stacked on top of one another and fanned out so that only the FHM logo and a portion of the woman's torso and thigh were visible on three of the magazine covers. A fuller image of the woman was shown only once, on the magazine cover atop the stack. The Complaint's inaccurate characterization of the newscast additionally contains distortions of the program that bear no relationship to what actually appeared onscreen. In contrast to the Complainant's speculation, at no point did any KCAL personnel utter the word "oops," or in any way suggest that the newscast involved some transgression of FCC rules that had mysteriously occurred to the surprise of the news anchor. *See* Att. A. *See also* Att. B.

The undergarment that was briefly depicted to illustrate the news story may have been sheer, but the image clearly does not violate the FCC's definition of broadcast "indecentcy." *See, e.g., Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299, 13303 (2006) ("*Omnibus Remand Order*") ("indecentcy findings require ... [f]irst, [that] the material ... must fall within the subject matter scope of our



indecent definition – that is, ... must describe or depict sexual or excretory organs or activities” and “[s]econd, the material must be patently offensive as measured by contemporary community standards for the broadcast medium” based on an “assessment,” considering “the full context in which the material appeared,” of “(1) the explicitness or graphic nature of the description; (2) whether [it] dwells on or repeats at length the descriptions; and (3) whether [it] panders [], titillates or shocks.”).

The Commission has said repeatedly that “context is all-important” in evaluating allegations of indecency. See, e.g., *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1920, 1922 n.13 (2004) (“*PTC Dismissals I*”). In this regard, it has exhibited a special sensitivity to claims that items in the news may be considered indecent. See, e.g., *Peter Branton*, 6 FCC Rcd. 610 (1991) (interview with John Gotti that contained numerous uses of the word “fuck” and its variants not indecent when broadcast in a “legitimate news report”); *Infinity Broad. Corp. of Penn.*, 3 FCC Rcd. 930, 934 (1987) (presence of potentially indecent material in a *bona fide* news program “of less concern” than in other contexts); *Petition for Clarification or Reconsideration of a Citizen’s Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976) (“we must take no action which would inhibit broadcast journalism”). Indeed, in a decision issued earlier today that cast serious doubt on the constitutionality of the indecency standard, the Court of Appeals for the Second Circuit noted “the Commission emphasized during oral argument that its news exception is a broad one.” *Fox Television Stations, Inc. v. FCC*, No. 06-1760 slip op. at 24 (2d Cir. June 4, 2006). In doing so, the Court quoted the Commission’s representation that it has “never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic ... purpose.” *Id.*

The Commission had most recently reinforced the principle that it must proceed with extreme caution in acting under its indecency rule with respect to news reports in the *Omnibus Remand Order*, where it dismissed an indecency complaint against a newscast that, as here, included a brief moment that drew the ire of a single viewer. The Commission “recognized the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming ... at the core of the First Amendment’s free press guarantee.” 21 FCC Rcd. at 13327. Indeed, of particular note here is a decision from the order that the *Omnibus Remand Order* amended, which involved a segment showing a man “wearing only a shirt” who, as he “is hauled from water level to the boat, [had] his penis [] briefly exposed” while being rescued from a flood. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664, ¶¶ 213-18 (2006) (“*Omnibus Order*”) (ruling on January 11, 2005 episode of *The Today Show*). The Commission held the broadcast was not indecent in significant part because it was “coverage of a significant news event.” *Id.* ¶ 217. To the extent that the Commission must exercise the “utmost restraint when it comes to news programming” to afford broadcasters the necessary



freedom to select what they report on and to decide how to report on it, *Omnibus Remand Order*, 21 FCC Rcd. at 13327, there can be no basis for not summarily dismissing the Complaint here.

The KCAL report at issue here is every bit as much a “*bona fide news*” item as the *Early Show* interview analyzed in the *Omnibus Remand Order*. See *id.* at 13328. As with the newscast in that case, *id.*, the *KCAL 9 News at Noon* covered a variety of other topics, including Lockheed Martin’s plans to begin building space shuttles in the wake of NASA’s decision to cease doing so; a new state smog-reduction plan to purchase from consumers their older, more polluting cars; a sinkhole that had opened in Brooklyn, New York, into which a car had fallen; an exploding manhole in Austin, Texas, resulting from a utility mishap; and a variety of health-related issues, including the benefits of certain types of exercise for breast cancer survivors, and the link between sleep disorders in infants and cognitive development.¹ Accordingly, even to the extent the Complainant here may not have appreciated the news item and imagery that accompanied it, the Complaint must be dismissed.

Even if the brief non-explicit image at issue here had not been presented in the context of a news report, it falls far short of the type of material that the Commission has considered to be actionably indecent. In this regard, the Commission has dismissed indecency complaints that were prompted by broadcast images of *bare buttocks*, e.g., *Omnibus Order* ¶¶ 225-26 (involving “clip in which a ‘butt plug’ was allegedly inserted into a naked, male infant”), of images that drew attention to buttocks displayed in form-fitting garments, *id.* ¶¶ 228-29 (involving “player for the visiting ... team who, after scoring a touchdown, acted as if he were lowering his pants and exposing his buttocks to the crowd,” i.e., “the player pretended to ‘moon’ the crowd”), and against animated depictions of both lingerie-covered buttocks. *id.* ¶ 220-22 (involving female cartoon characters who “dance[d] around poles clothed in two-piece or one-piece lingerie or underwear”), and *bare buttocks*. *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1920, 1931, 1937 (2004) (“cartoon boy removes his towel and enters the shower, his buttocks are briefly depicted”). Even more directly on point, the Commission has dismissed complaints against programs that featured the protracted display of images similar to the one that appeared in the KCAL noon newscast at issue here. See Letter from Charles W. Kelley, File No. EB-01-1H-0661/RBP (Mar. 21, 2002) (dismissing complaint against Victoria’s Secret fashion show because Complainant failed to show “the sexual aspects of the material was, in context, so graphic or explicit as to be patently offensive”). See also *PTC Dismissals I*, 20 FCC Rcd. at 1924 (“scene depict[ing] a maid undressing while a male character surreptitiously watches” as a

¹ See Att. A. In addition, the first portion of the news hour not found within the segment of the program that the Inquiry Letter requested included, among other things, a series of reports that lasted nearly nine minutes in total on local and national immigration protests, and a full report on the war in Iraq. The portion of the newscast provided as Attachment A also includes a community calendar announcing local public interest events. *Id.*



"portion of the side of the maid's breast is shown"). Cf. *Complaints Against Various Television Station Licensees Regarding the ABC Television Network's November 15, 2004, Broadcast of "Monday Night Football,"* 20 FCC Rcd. 5481 (2005) ("Monday Night Football") ("Sheridan, wearing only a towel, seeks to seduce Owens" in part by "drop[ping] her towel [whereupon t]he camera shows her from the back, nude from the waist up").

In this regard, the complained-of inclusion of a brief visual of an FHM magazine cover was neither graphic nor explicit, was not repeated or dwelt upon, and did not seek to pander, titillate or shock. See *supra* at 3. As explained above, the image of the woman included the portion of her body from mid-back to nearly the hollows of her knees, and she was clothed in an undergarment that, as noted, is not a thong or similarly skimpy cut. In addition, the image appeared once, for less than two seconds. See *Fox v. FCC, supra* (vacating and remanding change in FCC's "fleeting expletives" policy). It accordingly was not graphic or explicit, nor repeated or dwelt upon. See *Monday Night Football*, 20 FCC Rcd. at 5483 (imagery can be "sexually suggestive [yet] not graphic or explicit" especially where the "scene where Sheridan drops her towel ... is brief"). This brevity, along with the fact that it was included as an item in a newscast, also preclude the image from being deemed pandering, titillating or shocking. See *Peter Branton, supra* (uses of "fuck" and its variants in "legitimate news report [was not] gratuitous, pandering, titillating or otherwise 'patently offensive'"). Finally, the image was not part of any promotion of the news, nor was it presented early in the newscast to attract viewers, see Att. A, and this further undermines any claim that the broadcast sought to pander.

These points only begin to address the legal problems that would be associated with finding the Complaint to raise an actionable indecency claim, and KCAL expressly reserves the right to raise any additional statutory and/or constitutional defenses at an appropriate time.

As instructed in the Letter, this response is verified by the attached declaration of Martin P. Messinger, Vice President and Assistant Secretary of Los Angeles Television Station KCAL, LLC. If the Commission has any additional questions about this response, please contact the undersigned directly.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read 'Robert Corn-Revere'.

Robert Corn-Revere

Enclosures

cc: Benigno E. Bartolome, Room 4-C330

DECLARATION

I, Martin P. Messinger, in my capacity as Vice President and Assistant Secretary of Los Angeles Television Station KCAL, LLC, hereby declare under penalty of perjury that to the best of my knowledge, information and belief, the responses submitted to the May 3, 2007, letter of inquiry from Benigno E. Bartolome, Deputy Chief, Federal Communications Commission, Enforcement Bureau, Investigations and Hearings Division, in File No. EB-06-IH-1520, are true and complete. This certification is based on my personal knowledge of the representations provided in the responses.



Martin P. Messinger
Vice President and Assistant Secretary
Los Angeles Television Station KCAL, LLC

ATTACHMENT A

Los Angeles Television Station KCAL, LLC
Response to
Letter of Inquiry EB-06-IH-1520
June 4, 2007

Attachment A

Los Angeles Television Station KCAL, LLC
Response to
Letter of Inquiry EB-06-IH-1520
June 4, 2007

Attachment A

ATTACHMENT B

JOHANSSON SEXIEST [KCBS]ARCHIVES [KCBS]2006.MAR.27/11AM 5/11/2007 14:09:12

Page	Tal	"X"	Slug	P	Wrt	Vid	Efx/Gfx	G	Pos	Monitor	EST	SOT	Total	Ba
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SANDRA

KY: SEXIEST WOMAN

*SS2 A 1101

TAKE VO

:00

*CG Courtesy FHM Magazine

T :35

DUMP TAPE

((SANDRA))

WHAT MAKES A WOMAN "SEXY?"

A MEN'S MAGAZINE HAS PICKED
THE "100 SEXIEST WOMEN IN THE
WORLD."

((VO))

ACTRESS SCARLETT JOHANSSON
BOUNDED FROM THE NUMBER 9 SPOT
LAST YEAR -- TO THE TOP.

AND HERE'S WHY.

READERS OF FHM MAGAZINE SAY
HER SULTRY VOICE AND STRIKING
BEAUTY HAVE A LOT TO DO WITH IT.

BUT IT'S HER SELF CONFIDENCE
THAT EXUDES BEAUTY.

LAST YEAR'S SEXIEST WOMAN,
ANGELINA JOLIE SLIPPED TO NUMBER
TWO.